No. 89-951

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

MERRELL DOW PHARMACEUTICALS INC.,
Petitioner,

v.

MARY VIRGINIA OXENDINE,
Respondent.

BRIEF OF MARY VIRGINIA OXENDINE IN OPPOSITION

BARRY J. NACE*
PAULSON, NACE, NORWIND & SELLINGER
1814 N Street, N.W.
Washington, D.C. 20036
(202) 463-1999

IRVING R. M. PANZER
1814 N Street, N.W.
Washington, D.C. 20036
(202) 659-8108

Co-Counsel for Respondent

D.C. • (202) 331-8101

10 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

QUESTION PRESENTED

May this Court entertain the petition filed herein when that petition presents no federal issue and does not even pretend to identify a treaty, federal statute, or Constitutional provision involved in this case? See 28 U.S.C. 1257.

RESTATEMENT OF THE CASE

In view of our position, stated infra, that the Petition for Certiorari is not within the certiorari jurisdiction of this Court and also is so meritless as to be classified as frivolous, it seems hardly necessary to restate the facts so as to give this Court an accurate picture of the decision below. We do so, however, in very short compass.

First, we point out that the only decision before the Court, on this Petition, is the *second* decision of the District of Columbia Court of Appeals in this *Oxendine* matter, the decision known as *Oxendine II,* reported at 563 A.2d 330 and reprinted at App.1a. That decision deals only with how the Court of Appeals, in the exercise of its appellate jurisdiction, handled the findings and order of the trial judge made under D.C. Superior Court Rule 60(b). The first decision of the Court of Appeals in this case, known as *Oxendine I,* reported at 506 A.2d 1100 and reprinted at App.43a, is not before this Court; that decision terminated in 1987, with the denial of all motions including one for rehearing en banc, and certiorari was not sought. It was the decision in *Oxendine I* that ruled on the substantive portion of this case; it upheld the jury verdict that Bendectin was the cause of plaintiff's birth deformities. The Petition for Certiorari attempts, pp.10–13, 18–20, to insinuate the elements of *Oxendine I* into this proceeding by discussing alleged changes in the substantive law that have occurred since the date of that decision. Those matters are not involved here.

Second, the Petition omits completely to present the background and accomplishments of Dr. Alan K. Done, who was the subject of the Motion Judge's ire. For all that the Petition sets forth, it might be concluded that Dr. Done was an impostor, or at the least a scientist of mininum attainments. For example, the Petition presents Dr. Done as attempting to inflate his position in the field of toxicology, see Pet.p.8, n.7, to the extent that he gave himself a faculty "toxicology" title (Professor of Pharmacology and Toxicology) that did not exist,

see Pet. at pp.7–8. It may thus come as a surprise that Dr. Done is one of the outstanding experts in toxicology in this country. His impressive Curriculum Vitae runs 25 pages. He is a medical doctor specializing in pediatrics, pharmacology, and toxicology. He held professorships at the University of Utah, the University of Utah College of Pharmacy (where he was Professor of Clinical Pharmacology and Toxicology), and Wayne State University School of Medicine, and was Adjunct Professor at the Wayne State University School of Pharmacy and Allied Health Sciences. He served for four years as Special Assistant to the Director (for Pediatric Pharmacology) of the Bureau of Drugs, U.S. Food and Drug Administration.

Dr. Done served on the Editorial Boards for the publications entitled "Clinical Toxicology", "Clinical Pharmacology and Therapeutics", "Toxicology and Applied Pharmacology," and "Handbook of Analytical Toxicology". He was the Poisons Editor of the publication "Emergency Medicine". Dr. Done's C.V. contained a large number of Consultantships, Fellowships, Honors, and Certifications in toxicology and pediatrics, and listed 168 technical papers of which he was the author or co-author; it also lists countless engagements as chairman, organizer, speaker, or participant in various meetings and symposia in toxicology, pharmacology, and associated fields. To top this off, Dr. Done was the recipient of the first Joint Recognition Award of the American Academy of Clinical Toxicology and the Canadian Academy of Clinical and Analytical Toxicology.

There is much more, but this is enough to convey to this Court the flavor of Petitioner's Statement of the Case. The idea that Dr. Done, whose title at Wayne State was Professor of Pediatrics and Pharmacology, called himself Professor of Pharmacology and Toxicology in order to boost his status in toxicology, is ludicrous.[1]

---

[1]Dr. Done did not speak in capital letters; it was the court reporter who put the capitals on, and thus appeared to create a faculty title. It is undisputed that toxicology is taught as part of pharmacology, which is all that Dr. Done was saying.

Third, the Petition states, p.14, that the basis for the Court of Appeals decision "to disregard nearly all the perjury" was the lack of diligence of Merrell Dow's counsel in not discovering the facts before trial. This "lack of diligence" theme is then rehashed in the Reasons for Granting the Writ, pp.16–18.

Even if this were the sole basis of the Court of Appeals, it is obviously not a ground for granting certiorari. But a glance at the Court of Appeals decision, pp.9a–15a, shows that the court found that *there was no perjury*. After discussing the diligence factor, the Court of Appeals turned to the six alleged misstatements of Dr. Done and said, somewhat delicately, that as to five of them, "our reading of the record differs substantially from" the trial judge's reading, p.10a. As to the sixth, the Court pointed out that a finding of perjury requires a finding of materiality, and in view of Dr. Done's "qualifications to teach and his significant contributions to his field of expertise", p.12a, and in view of Dr. Done's "distinguished forty-year career in his fields of expertise", p.15a, his misstatement as to his faculty status at the time of his testimony was not material.

REASONS FOR DENYING THE PETITION

Rule 49.2 of this Court provides that if a petition for certiorari is "frivolous", the Court may award the respondent "appropriate damages". The petition filed in this case is a prime candidate for the post of "frivolous".

There is no jurisdiction in this case.[2] 28 U.S.C. 1257(a) provides for review by this Court, on writ of certiorari, of final

[2]The petition concedes that the jurisdictional basis here must be—if anything—28 U.S.C. 1257 (see Pet., p. 2), which deals with final judgments rendered by "the highest court of a State", and provides that for this purpose, that phrase includes the District of Columbia Court of Appeals. As Professor Moore points out, 12 *Moore's Federal Practice* 8–55, that court "should not be confused with the United States Court of Appeals for the District of Columbia" Circuit, to which 28 U.S.C. 1254 applies.

judgments or decrees rendered by the highest court of a State

> where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

The Petition for Certiorari does not identify or even mention a treaty, a federal statute, a state statute, or any provision of the Constitution. The "Reasons for Granting the Writ", pp. 15–20, like all the rest of the Petition, deal solely with the manner in which the D.C. Court of Appeals handled the appellate process of its own court system. (And the decisions cited by the Petition, like *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944), cited at p. 16, deal with *federal* courts.) Accordingly, 28 U.S.C. 1257(a) is not invoked and this Court does not have jurisdiction to entertain this Petition for Certiorari. Not a single issue of federal interest is raised.

Indeed, petitioner has ignored completely the guideposts of Rule 17.1(b) and (c) of this Court which provide that the basis for granting certiorari, where non-federal courts are concerned, is the involvement of a "federal question" or "an important question of federal law".[3] Petitioner has presented nothing to this Court except complaints about the manner in which the highest court of a "state" has handled its own appellate jurisdiction. Even if this were a case coming from a federal

[3]Of course the petition also violates Rule 21.1(h) of this Court which requires that "if review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings, both in the court of first instance and in the appellate court, at which *the federal questions* sought to be reviewed were raised, ..." (Emphasis added) We speak here of the Rules in effect when the petition was filed.

court, petitioner has shown nothing but a disagreement with the way the court has dealt with an abuse-of-discretion contention, and thus the petition involves nothing but the facts of this one case; but coming as it does from a non-federal court system, the matter does not even fall within the supervisory power of this Court over the federal system. This Court is not about to tell another court system how to conduct its managerial affairs, nor could it do so unless some Constitutional right were involved.

It seems unnecessary, after what we have said, to treat in detail the alleged points raised by petitioner in its Reasons for Granting the Writ (pp.15–20), but we will comment briefly.

We begin by noting that an appeal is not a Constitutional right; the Constitution guarantees only a right to trial in one court. *Cobbledick v. United States*, 309 U.S. 323, 324–5 (1940); see *Civil Procedure*, James & Hazard (3rd Ed., 1985), p.661. A state need not have an appellate procedure at all. If it does, the procedure may of course vary from that which obtains in federal courts. For example, the "final judgment" rule so familiar in federal courts need not apply in state court systems, and some states do permit appeals from most interlocutory orders, New York being the prime example. See *Civil Procedure*, James & Hazard, supra, at p.43.

It is thus remarkable to note that in this case, dealing with a non-federal appellate system, every decision cited in the Reasons for Granting the Writ is a decision involving the *federal* court system and the Rules of Procedure governing the federal courts (except for citations dealing with the obligations of counsel). Those decisions are totally inapplicable here. Whether or not (to take up the three Reasons stated on page 15 of the Petition) a state appellate court may substitute its own factual findings for those of its trial courts, or create a new standard requiring opposing counsel to detect perjury at trial, or refuse to consider recent changes in law where judgments are not yet final—those are matters solely for the state court;

they involve no federal issue. As the Court said in *Linkletter v. Walker*, 381 U.S. 618, 629 (1965), with regard to whether recent changes in the law must be taken into account by an appellate court:

> . . . the Constitution neither prohibits nor requires retrospective effect. As Justice Cardozo said, "We think the Federal Constitution has no voice upon the subject".[4]

This Petition for Certiorari, meritless as it is, and lacking jurisdiction, seems clearly to have been filed solely for the purpose of delay.[5] On that ground alone it is sanctionable under Rule 49.2 as "frivolous". *Dening v. Carlisle Packing Co.*, 226 U.S. 102, 106 (1912); *Gibbs v. Diekma*, 262 U.S. 226, 233 (1923). And see *Tatum v. Regents of Nebraska-Lincoln*, 103 S.Ct. 3084 (1983), for application of the "frivolous" rule as to the merits.

---

[4]This would be true even if there were "a change in the law", to use petitioner's phrase. But there is no change in the law even in the sense of the cases cited in the Petition. All that we have in the Bendectin situation is the decision of various courts on the facts before them; nothing is "changed". The "change in law" argument stems from the foundation case of *United States v. Schooner Peggy*, 1 Cranch 103, 110 (1801), where Chief Justice Marshall said: "But if subsequent to the judgment and before the decision of the appellate court, *a law intervenes and positively changes the rule which governs*, the law must be obeyed or its obligation denied". He went on to say that "in mere private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retrospective application, affect the rights of parties, but *in great national concerns . . .* the Court must decide according to existing laws". (Emphasis added) Of course *Schooner Peggy* was a federal question case.

[5]The Complaint in this case was filed in 1982; the trial took place in May, 1983. The case has now twice been through the District of Columbia Court of Appeals, each time resulting in a victory for the plaintiff—a young girl born with birth defects and deformities which the Court of Appeals has found were caused by petitioner's product, Bendectin. But plaintiff thus far has not received one penny from petitioner, owing to the snowstorm of pleadings, motions, and legal maneuverings of the petitioner.

CONCLUSION

The Petition for Certiorari should be denied.

Respectfully submitted,

BARRY J. NACE*
PAULSON, NACE, NORWIND
& SELLINGER
1814 N Street, N.W.
Washington, D.C. 20036
(202) 463-1999

IRVING R. M. PANZER
1814 N Street, N.W.
Washington, D.C. 20036
(202) 659-8108
Co-Counsel for Respondent

*Counsel of Record

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th day of January, 1990, three copies of the foregoing was mailed, postage prepaid to Vincent H. Cohen and Walter A. Smith, Jr., Hogan & Hartson, 555 13th Street, N.W., Washington, D.C. 20004.

Barry J. Nace